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(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
Hardin County, OH	) RCRA (3008) Appeal No. 92-1
Docket No. RCRA-V-89-R-29	)

[Decided November 06, 1992]

REMAND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

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HARDIN COUNTY, OH

RCRA (3008) Appeal No. 92-1

REMAND ORDER

Decided November 06, 1992

Syllabus

U.S. EPA Region V appeals from an order dismissing a complaint charging Hardin County, Ohio with disposing of hazardous waste without a permit or interim status, and seeking a $45,000 penalty in addition to closure of the facility. Region V alleges that Hardin County received sludges produced between 1983 and 1987 that are hazardous waste by virtue of the "mixture rule" contained in 40 C.F.R. §261.3. While this case was pending before the presiding officer, the mixture rule was invalidated in *Shell Oil v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). The presiding officer dismissed the complaint, rejecting Region V's argument that *Shell Oil* invalidated the mixture rule prospectively only. Region V appealed, asking the Board to accept its interpretation of *Shell Oil*, and vacate the dismissal of the complaint.

Held: The complaint against Hardin County alleges violations that occurred both before and after Ohio lost its interim authorization. The record is silent as to the specific dates of the violations, and therefore it is not clear whether the Ohio or federal mixture rule applies to the conduct at issue. These matters must be established before reaching any decision on the applicability of *Shell Oil* to the complaint. Accordingly, a remand is warranted for the presiding officer to determine the date of the alleged violations and the applicable law.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

On June 13, 1989, U.S. EPA Region V filed a complaint alleging that Hardin County illegally disposed of hazardous waste without a permit or interim status under the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§6901 *et seq.* The illegal disposal allegedly took place at Hardin County's landfill in Kenton, Ohio, where it received certain sludges from Occidental Chemical Corporation. Region V contends that these sludges, which were produced between 1983 and 1987, are hazardous waste by virtue of the

"mixture rule" contained in 40 C.F.R. §261.3. [1] The mixture rule is part of the regulatory definition of hazardous waste, and includes as hazardous waste all wastes that are "a mixture of solid waste and one or more hazardous wastes listed in Subpart D * * *." 40 C.F.R. §261.3. The complaint seeks a penalty of $45,000 for Hardin County's failure to obtain a permit or interim status prior to accepting hazardous wastes for disposal, and also seeks closure of the facility in accordance with State and federal requirements.

After a full hearing and briefing in this matter, but before an initial decision was issued, the D.C. Circuit Court of Appeals invalidated the mixture rule in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). [2] The Court vacated and remanded the rule on the ground that the Agency failed to follow public notice and comment procedures when promulgating the rule as required by the Administrative Procedure Act (APA), 5 U.S.C. §553(b). The Court, however, also invited EPA to reissue the rule on an interim basis without notice and comment under the "good cause" exemption provided in the APA, 5 U.S.C. §553(b)(3)(B), "[i]n light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes * * *." 950 F.2d at 752.

Based on the Court's stated concern about "discontinuity" in the regulatory program, EPA filed a motion with the Court of Appeals, requesting it to clarify the decision, stating that the opinion does not specify whether the holding setting aside the rule applies only prospectively, as EPA believes, or whether it applies retroactively. Upon consideration, the Court denied this motion.

After the decision in *Shell Oil*, the presiding officer in this case ordered the parties to show cause why the complaint against Hardin County should not be dismissed in light of the invalidation of the mixture rule by *Shell Oil*. Region V responded, arguing that *Shell Oil* invalidated the mixture rule prospectively only,

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[1] The alleged hazardous waste disposed of is sludge from Occidental Chemical Corp. (OCC). The sludge was created when a November 1983 spill of 11,000 lbs. of phenol, and a 1984 spill of 2,000 lbs. of spent acetone solvent, worked their way to OCC's surface impoundments. The complaint also alleges that hazardous waste sludge was created by OCC's discharge of formaldehyde each year from 1983 to 1987, but the presiding officer concluded that these spills came within the de minimis exception to the mixture rule, and thus were not hazardous waste.

[2] In *Shell Oil*, the D.C. Circuit Court of Appeals also invalidated the "derived-from rule." That rule defines as hazardous waste a "solid waste generated from the treatment, storage, or disposal of a hazardous waste * * *." 40 C.F.R. §261.3. This provision is not at issue in this case.

that is, only from the date of *Shell Oil* forward, thus allowing pending enforcement actions instituted prior to *Shell Oil* to proceed.

On July 10, 1992, the presiding officer rejected this argument and dismissed the complaint on the ground that *Shell Oil* invalidated the mixture rule retroactively. The presiding officer relied in part on *U.S. v. Goodner Brothers Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992), in which the Eighth Circuit Court of Appeals rejected EPA's argument that *Shell Oil* invalidated the mixture rule prospectively only, and set aside a criminal conviction based on the mixture rule. The presiding officer concluded that the claims in the complaint are premised on an invalid rule, and therefore the claims against Hardin County are unenforceable. This appeal followed, and the Board heard argument on September 30, 1992.

On appeal, Region V again makes the same arguments EPA made in its *Shell Oil* post-decision motion and in *Goodner Brothers*. Region V asks this Board to determine whether *Shell Oil* invalidated the mixture rule retroactively or prospectively only. We need not address this issue at this time, however, because the relevant counts of the complaint may be governed in their entirety by the Ohio mixture rule and not the federal mixture rule at issue in *Shell Oil*. Because the record is silent as to the facts necessary to determine conclusively whether the Ohio mixture rule and not the federal mixture rule controls the outcome of this case, a remand for further proceedings is warranted.

Under RCRA §3006, EPA may authorize any State to administer and enforce a hazardous waste program. To obtain EPA authorization, the state program must be equivalent to the federal program and consistent with the hazardous waste programs applicable in other States. RCRA §3006(b). In addition, the State must provide adequate enforcement. *Id*. An authorized State can "carry out such program in lieu of the Federal program under [RCRA] in such State." *Id*. In such a State, the state hazardous waste regulations operate in lieu of the federal regulations. [3] In contrast, in an unauthorized State, the state regulations do not operate in lieu of the federal regulations, and hazardous waste treatment, storage and disposal facilities must comply with the federal regulations (in addition to any applicable state or local regulations).

RCRA specifically allows EPA to bring an enforcement action in an authorized State for violations of the State's hazardous waste regulations. *In re*

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[3] The federal regulations, by their terms, do not apply in an authorized State. *See* 40 C.F.R. §§264.1(f) and 265.1(c)(4); 45 Fed. Reg. 33,176 (May 19, 1980).

CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11 (CJO, Aug. 18, 1988) (hereafter *Chemical Waste*). Section 3008(a)(1) of RCRA provides that EPA may issue a compliance order or assess a civil penalty against anyone who "has violated or is in violation of any *requirement* of this subchapter." (Emphasis added.) Any doubt as to whether this authority extends to violations occurring in authorized States is removed by section 3008(a)(2), which requires EPA to give notice to the authorized State whenever EPA brings an enforcement action in the State under section 3008. [4] Significantly, whenever EPA brings an enforcement action in an authorized State, EPA is enforcing State law because the authorized state program is a "requirement" of RCRA. [5] *See United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314 (D.S.C. Jan. 27, 1988). If, on the other hand, the State does not have an authorized program, the State regulations are not "requirements" of RCRA and EPA has no authority to enforce those regulations, even if they are identical to the federal regulations. EPA's authority in an unauthorized State is necessarily restricted to enforcing the federal hazardous waste regulations.

In this case, the State of Ohio received its interim authorization under RCRA §3006(c) on July 15, 1983, thus enabling EPA to enforce the requirements of Ohio's hazardous waste program commencing on that date. *See* 48 Fed. Reg. 32,345 (July 15, 1983). The interim authorization lapsed, however, on January 31, 1986, 51 Fed. Reg. 4,128 (Jan. 31, 1986), and the State did not receive reauthorization until June 28, 1989. *See* 54 Fed. Reg. 27,173 (June 28, 1989). These dates are highly important to the instant proceeding, because most of the violations alleged in Region V's complaint appear to have occurred during the period when Ohio was an authorized State, yet the complaint clearly charged

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[4] Section 3008(a)(2) provides as follows:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 [RCRA §3006] of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

[5] As explained in *Chemical Waste*,

> The obvious and natural reading of the phrase "any requirement of this subchapter" in Section 3008(a) embraces the requirements of the federal program and the requirements of any EPA-approved state program. * * * RCRA *requires* either the federal or an approved state program to be in effect in each state. *See* RCRA §3006. There is no hiatus in the coverage of subchapter III. Thus an EPA-authorized state regulation is as much a requirement of subchapter III as a regulation issued by EPA.

Id., unpub. op. at 4 (footnote omitted); *see also In re Commonwealth Oil Refining Co. Inc.*, RCRA (3008) Appeal No. 87-16 (CJO, Sept. 21, 1989).

Hardin County with violations of the *federal* mixture rule (even though there was a state mixture rule in effect during the same period). During the period of Ohio's interim authorization, when most of the violations allegedly occurred, the only hazardous waste regulations applicable to Hardin County were Ohio's, which were operating in lieu of the federal regulations.

Region V filed the complaint after Ohio's interim authorization had expired, alleging that violations occurred between 1983 and 1987. The Region claims that because the complaint was filed when Ohio was not authorized, the complaint need only cite violations of the federal regulations (including the federal mixture rule) and not the state regulations. Tr. at 6-7 (Sept. 30, 1992). This reasoning is faulty and internally inconsistent. The filing date of the complaint has nothing to do with which regulations (State or federal) are applicable to the conduct at issue. Regardless of the filing date, the complaint can only charge Hardin County with violations of laws that apply when the alleged misconduct takes place; it cannot charge Hardin County with violations of regulations that did not apply to the conduct at issue. Thus, to be in accord with RCRA §3006 for violations that allegedly took place when Ohio's interim authorization was in effect, the complaint would have to charge Hardin County with violations of Ohio's regulations. Conversely, violations occurring after the authorization had lapsed would have to be based on federal regulations. In this instance, by improperly focussing on the filing date, the Region failed to make these necessary distinctions even though the violations alleged in the complaint span a period of time (1983 to 1987) when Ohio had at once acquired authorization and then lost it.

In our opinion, the fact that some violations may have occurred after January 31, 1986 (the date Ohio lost its authorization) does not negate the fact that for conduct occurring before that date Hardin County is only potentially liable for violations of state regulations, and that the Region, therefore, should have cited the appropriate state regulations for any alleged misconduct occurring during the pre-January 31, 1986 period. This principle is important not only in its own right, but it is also critical to the scope of matters appropriate for the Board to consider on appeal. *Shell Oil*, which served as the presiding officer's basis for dismissing the complaint against Hardin County, and which is at the core of this proceeding on appeal, is obviously not determinative if the federal mixture rule is not implicated in this case. First, because most of the alleged misconduct occurred prior to January 31, 1986, during Ohio's interim authorization, the federal mixture rule did not apply to that conduct, having been supplanted by the

authorized state program. [6] Therefore, for this reason alone, dismissal of the entire complaint on the basis of the alleged invalidity of the federal rule was ill-founded. Second, although the Region may properly allege a violation of the federal mixture rule for events occurring after that date, the post-January 31, 1986 violations in the complaint were apparently dismissed by the presiding officer on unrelated grounds. [7] The latter ruling calls into question whether *Shell Oil* would have any bearing on this aspect of the complaint. These two considerations make clear that the complaint should not have been dismissed in reliance on *Shell Oil* without further analysis. Nevertheless, as noted earlier, because the record is silent as to the facts necessary to determine all of these matters conclusively, a remand for further proceedings is warranted.

Although the complaint and the record provide the date of the Occidental Chemical Corporation spills that created the hazardous waste sludges, they are silent as to when Hardin County accepted these wastes. These dates are important for the reasons previously indicated. Therefore, the date(s) of the alleged violations must be established before determining whether the federal or the Ohio mixture rule governs Hardin County's actions, and therefore before reaching any decision on the applicability of *Shell Oil* to the complaint. The presiding officer's dismissal of the complaint without this information solely on the basis of *Shell Oil* was erroneous. We hereby vacate the order dismissing the complaint, and remand this case to the presiding officer to reopen the record for the purpose of determining the specific dates of the alleged violations. When these dates are established, the presiding officer must then determine whether the federal or Ohio regulations govern each alleged violation. If the Ohio regulations are controlling, in whole or in part, the presiding officer may proceed with this case as if no dismissal order had been entered, because there has already been a full hearing on the merits, and Hardin County conceded at oral argument that its defense would have been no different under the Ohio regulations. [8]

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[6] The mixture rule invalidated by *Shell Oil* was a federal regulation not a state regulation, and the basis for the invalidation was procedural not substantive. Therefore, the validity of state mixture rules is not at issue by reason of the Court's ruling, since they would have been promulgated under procedures different from those used for the federal mixture rule. Questions as to the federal enforceability of state mixture rules are not addressed in this remand order.

[7] It appears that these violations were dismissed because they were based on spills of formaldehyde that the presiding officer determined were encompassed within the de minimis exception to the hazardous waste definition. The merits of that ruling are not before the Board, and therefore we express no opinion on the correctness of the ruling.

[8] There is no need to retry factual issues previously decided. The Ohio mixture rule is identical to the federal mixture rule, *see* Ohio Administrative Code §3745-51-03(A)(2)(f), and the Region relied extensively in the presentation of its case on Ohio EPA's determination that the wastes are hazardous. *See* Complainant United States Environmental Protection Agency's Proposed Conclusions of Law, dated July

(continued...)

We recognize that some of the alleged violations may ultimately be shown to be governed by the federal mixture rule. In that event, the *Shell Oil* issue will eventually need to be resolved. Nevertheless, the case as presently formulated does not squarely present the issue on the record, and therefore a decision on the issue will have to be postponed until such a case is presented to the Board.

So ordered.

(...continued)

19, 1991. Accordingly, the Region's failure to cite the Ohio regulations in the complaint is harmless error in so far as the evidentiary phase of the proceeding is concerned. Hardin County has conceded that its evidentiary defense would be no different under the Ohio rule. Tr. at 30 (Sept. 30, 1992).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of Hardin County, Ohio, RCRA (3008) Appeal No. 92-1, were sent to the following persons in the manner indicated:

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Brenda H. Selden
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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Hardin County, OH	)	
Respondent	)	RCRA (3008) Appeal No. 92-1
Docket No. RCRA-V-W-89-R-29	)	

CERTIFICATION SHEET

The Environmental Appeals Board hereby certifies that the attached ***Remand Order*** in the above-referenced matter accurately reflects the opinion of the Board.

Nancy B. Firestone
Environmental Appeals Judge

Date

Ronald L. McCallum
Environmental Appeals Judge

Date

Edward E. Reich
Environmental Appeals Judge

Date